IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1553

COUNTY OF LOS ANGELES; BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES; AND CIVIL SERVICE COMMISSION OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

VAN DAVIS, HERSHEL CLADY AND FRED VEGA, individually and on behalf of all others similarly situated, WILLIE C. BURSEY, ELIJAH HARRIS, JAMES W. SMITH, WILLIAM CLADY, STEPHEN HAYNES, JIMMIE ROY TUCKER, LEON AUBRY, RONALD CRAWFORD, JAMES HEARD, ALFRED R. BALTAZAR, OSBALDO A. AMPARAH, individually and on behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council ("EEAC") is submitted pursuant to the written consent of all parties,[1] and in support of the petitioners. EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and 42 U.S.C. § 1981 as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in the instant case—i.e.,

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[1] Their consents have been filed with the Clerk of the Court.

whether proof of a purposeful intent to discriminate is necessary to establish a violation of § 1981, and whether imposition of a racial hiring quota was an appropriate remedy.

Because of its interest in issues pertaining to equal employment, EEAC has sought and been granted permission by this Court to file briefs as *Amicus Curiae* in a number of other recent cases raising important related issues. See *e.g.*, *The Regents of the University of California* v. *Allan Bakke*, —— U.S. ——, 48 U.S.L.W. 4896 (1978); *Furnco Construction Corporation* v. *Waters*, —— U.S. ——, 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.*, v. *Rodriguez*, 431 U.S. 395 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Gardner* v. *Westinghouse Broadcasting Company*, —— U.S. ——, 46 U.S.L.W. 4761 (1978).

STATEMENT OF THE CASE

As part of the selection process for entry-level firefighters, petitioner County of Los Angeles imposed a 5'7" height requirement on all applicants and, in August of 1969 and January of 1972, administered written verbal aptitude tests. On January 11, 1973, respondents herein filed a class action complaint on behalf of themselves and all present and future—but not past—black and Mexican-American applicants for positions as firemen alleging that petitioners had been guilty of racial discrimination in hiring in violation of: (1) the Fourteenth Amendment, (2) Title VII of the Civil Rights Act of 1964, and (3) 42 U.S.C. §§ 1981 and 1983.

The district court found that there existed a racial imbalance in the fire department resulting, at least in part, from the 1969 and 1972 use of unvalidated written tests having a disproportionate impact on minority applicants. The height requirement was determined to be "substantially and reasonably related to job performance as a fireman," and therefore valid. Without specifying which of the alleged constitutional and statutory provisions had been violated—and in spite of a finding that none of the petitioners had acted with "a willful or conscious purpose" of excluding minorities from employment—the district court imposed a hiring quota of one black and one Mexican-American applicant for every three white applicants until racial parity with the surrounding population was achieved.

The Ninth Circuit (Judge Wallace dissenting)[2] significantly pruned the scope of the district court's findings. Since no purposeful or intentional discrimination had been established, the Fourteenth Amendment and § 1983 violations were reversed on the basis of *Washington* v. *Davis*, 426 U.S. 229 (1976). The Court also reversed all violations pertaining to the 1969 test on the basis that since neither the individual claimants nor any members of the class had been adversely affected by that examination, they lacked standing to challenge its validity. Because the 1972 test was administered before Title VII became applicable to municipalities, and since the results of the test were never actually used

[2] *Van Davis, et al.* v. *County of Los Angeles, et al.*, 566 F.2d 1334 (C.A. 9 1977).

in the selection process,[3] the Title VII violation predicated thereon was limited to the "continued threat" that the test might one day be used.

The Ninth Circuit did, however, affirm the § 1981 violations which were predicated upon the 1972 test and the height requirement. The court concluded that since these unvalidated selection devices had an adverse impact upon minorities, § 1981 violations had been established under the principles announced in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The court thus held that a *prima facie* case of employment discrimination under § 1981 could be established in the absence of an intent to discriminate.

The court of appeals also approved the imposition of a remedial hiring quota despite respondents' lack of standing to challenge practices predating their employment applications and despite their concession that all post-application selection procedures had been nondiscriminatory. Moreover, the court did not disturb the district court's findings that petitioners (1) did not act with a "willful or conscious purpose of excluding [minorities] from employment," and (2) "did not interfere with affirmative action efforts of individual persons designed to increase [minority] participation rates in the work force." Nevertheless, the Ninth Circuit approved the imposition of a remedial hiring quota "to overcome the presently existing effects of past discrimination within a reasonable period of time"—effects which, by definition, were the

[3] In an amended complaint respondents conceded that all post-1972 hiring was nondiscriminatory.

result of conduct—specific nature unproven—which predated the employment applications of all class members.

SUMMARY OF ARGUMENT

The Ninth Circuit's determination that a § 1981 violation can be established in the absence of an intent to discriminate is legally unsound and, as a practical matter, will seriouslly jeopardize efficient enforcement of the federal equal employment opportunity program.

Section 1981 was enacted, at least in part, to codify the equal protection clause of the Fourteenth Amendment. In contrast, Title VII is designed to supplement pre-existing judicial relief available under § 1981 and the Fourteenth Amendment with broad administrative relief against a wide range of employment discrimination practices. Given the correlative relationship between § 1981 and the Fourteenth Amendment—a relationship not shared with Title VII —the standard of proof for § 1981 claims should be consistent with that established for Fourteenth Amendment claims.

Section 1981, by guaranteeing to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" is fundamentally an equal protection statute. In *Washington* v. *Davis* this Court professed difficulty in understanding how a racially neutral qualification for employment—there, as here, an aptitude test—could violate equal protection guarantees "simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 426 U.S. at 245. The Court observed that unsuccessful Negro applicants

had no greater claim to the denial of equal protection than did unsuccessful white applicants. Similarly in this case, white applicants who failed the 1972 examination were subject to the same disqualification from contracting with petitioners as were unsuccessful minority applicants. It cannot be said, therefore, that the minority applicants were denied "the same right" to contract as white applicants even assuming a higher minority failure rate.

Finally, applying the less stringent Title VII burden of proof to § 1981 claims would have the practical effect of undermining both this Court's decision in *Washington* v. *Davis* and the major goals sought to be accomplished by Congress through enactment of Title VII. In *Washington* v. *Davis*, this Court refused to apply the "disproportionate impact" standard of proof to equal protection claims for fear of jeopardizing "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome on the poor and to the average black than to the more affluent white." 426 U.S. at 248. Since the equal protection clause of the Fourteenth Amendment and § 1981 are substantively coextensive, the Ninth Circuit's ruling simply guarantees through § 1981 claims the very result sought to be avoided by this Court in requiring a higher standard of proof for Fourteenth Amendment claims.

Similarly, Congress sought through enactment of Title VII to encourage the prompt and voluntary conciliation of employment discrimination claims. Accordingly, Title VII has a relatively short statute of limitations and mandates administrative conciliation efforts prior to commencement of suit. In contrast,

§ 1981 imposes no preconditions to suit and authorizes longer limitations periods. If the Ninth Circuit is correct that in terms of standards of proof "there remains no operational distinction . . . between liability based upon Title VII and § 1981," 566 F.2d at 1340, claimants will be able to defy Congressional desire and circumvent Title VII conciliation and limitation requirements simply by alleging § 1981 claims instead.

In any event, in view of the limited post-1971 violations which it found, "the Court of Appeals simply had no warrant . . . for imposing the system-wide remedy which it apparently did. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977). The only violations seen by the Ninth Circuit were the County's *unfulfilled* decisions to use the 1972 written test as a selection device and to utilize the height requirement. As Judge Wallace pointed out, the respondents' conceded that "the post-March 1972 discrimination . . . had no 'effects'." 566 F.2d at 1352. In addition, the majority below ruled that none of the named or putative class members had standing to attack any employment practices predating their 1971 employment applications. As a result, the work force statistics upon which the Ninth Circuit predicated the quota necessarily were the result of pre-1971 hiring practices, since no firemen were hired thereafter until after the complaint was filed. These statistics bear no relevance to the violations found or the remedy imposed.

Lacking an appropriate violation upon which to base its remedy, the quota remedy was outside the court's equitable authority, *Milliken* v. *Bradley*, 418

U.S. 717, 744 (1974), and in contrast with the vast majority of courts which have viewed quotas as an extreme remedy which may only be imposed where no adequate relief can be obtained without their use. See *e.g.*, *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975), *reh'g en banc denied*, 531 F.2d 5, *cert. denied*, 429 U.S. 823 (1976). Seen in this light, the remedial order below is at odds with this Court's prior ruling that an employer's hiring obligation "is [only] to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 46 U.S.L.W. 4966, 4970 (1978) (Emphasis in original).

ARGUMENT

I. The Standard of Proof For § 1981 Claims Should Be The Fourteenth Amendment Purposeful Discrimination Standard Established In *Washington* v. *Davis* Rather Than The Title VII Disproportionate Impact Standard Announced In *Griggs* v. *Duke Power Co.*

In predicating a § 1981 violation upon the basis of a Title VII "disproportionate impact" finding alone, the Ninth Circuit has parted company with six other circuits which have either held or implied that the burden of proof under § 1981 is to be measured in accordance with the more stringent Fourteenth Amendment standard set forth in *Washington* v. *Davis*.[4] Under that standard an employment practice

[4] Third: *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126, 140-145 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3403 (U.S. Nov. 28, 1977) (No. 77-762); *Wade* v. *Mississippi*

is unlawful only if intentional or purposeful discrimination can be established. As shown below, there are sound legal and practical reasons for reversing the Ninth Circuit.

A. The Equal Protection Clause of the Fourteenth Amendment and § 1981 are Correlative Provisions Which Should Require the Same Standard of Proof.

In the course of interpreting § 1981 [5] this Court has on several occasions in recent years examined its con-

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Cooperative Extension Service, 528 F.2d 508, 518 (5th Cir. 1976); Sixth: *Arnold* v. *Ballard*, —— F.2d ——, 12 EPD (CCH) par. 11,224 (6th Cir. 1976) (Upon remand, the district court specifically relied upon Judge Wallace's dissent herein. Memorandum Decision and Order, C73-478, Mar. 14, 1978); Seventh: *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977) (In absence of intent showing, all constitutional violations—including § 1981—reversed); Eighth: *Johnson* v. *Alexander*, 572 F.2d 1219, 1223 (8th Cir. 1978); Tenth: *Chicano Police Officers Assn.* v. *Stover*, 552 F.2d 918, 920 (10th Cir. 1977). See also *Lewis* v. *Bethlehem Steel Corp.*, 440 F. Supp. 949, 963 (D. Md. 1977); *Croker* v. *Boeing Co.*, 437 F. Supp. 1138, 1181 (E.D. Pa. 1977); *Dickerson* v. *United States Steel Corp.*, slip op. p. 20, No. 73-1292 (E.D. Pa. August 2, 1978); *Veizaga* v. *National Board for Respitory Therapy*, —— F. Supp. ——, 13 EPD (CCH) par. 11,525, p. 6881 (N. D. Ill. 1977); *Ortiz* v. *Bach*, —— F. Supp. ——, 14 FEP Cases 1019, 1021 (D. Col. 1977); But see *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 838, n.22 (D.C. Cir. 1977); *League* v. *City of Santa Ana*, 410 F. Supp. 873, 891-896 (C.D. Cal. 1976).

[5] Section 1981, entitled "Equal Rights Under the Law," provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

stitutional and legislative origins. See *Runyon* v. *McCrary*, 427 U.S. 160, 168-175 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-296 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 439-440 (1973); cf. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417-437 (1968). In *Runyon* concurring Justices Powell and Stevens and dissenting Justices White and Rehnquist expressed concern that § 1981 has in recent years been interpreted too broadly and in a manner which, in the words of Mr. Justice Stevens, "would have amazed the legislators who voted for it." 427 U.S. at 189. The decision of the Ninth Circuit herein, if permitted to stand, would further dislodge § 1981 from its constitutional and legislative roots.

In *Runyon*, this Court concluded that § 1981 flowed from both § 16 of the Voting Rights Act of 1870 [16 Stat. 144] and § 1 of the Civil Rights Act of 1866 [14 Stat. 27]. 427 U.S. at 169, n.8.[6] It is instructive to examine both tributaries. As the Court

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[6] Mr. Justice White in a dissent joined by Mr. Justice Rehnquist contended that § 1981 is derived from § 18 of the 1870 statute alone. It is unnecessary to resolve this conflict because, as indicated below, whether § 1981 is viewed as a product of both the 1866 and 1870 enactments, or of the 1870 enactment alone, the correlative nature of § 1981 and the equal protection clause of the Fourteenth Amendment is patent.

has noted on several occasions, "the operative language of both § 1981 and § 1982 [7] is traceable to the Act of April 9, 1966." *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. at 439; *Runyon* v. *McCrary*, 427 U.S. at 171.

Section 1 of the 1866 Act [8] was enacted under sanction of the Thirteenth Amendment. *Buchanan* v. *Warley*, 245 U.S. 60, 78 (1917). According to Senator Trumbull, its author and principal Senate sponsor, the purpose of the Act was to "destroy the discrimination made against the Negro in the laws of the Southern States and to carry into effect the Thirteenth Amendment." H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 20-21 (1908). Immediately upon enactment, however, twin concerns developed that the statute was vulnerable to repeal by a subsequent Congress and that its application to the states was of questionable constitutionality.[9] Within two months a joint resolution was drafted addressing these concerns. The resolution eventually became the Fourteenth Amendment. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675 (1898); *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948).

Courts and historians both have recognized that a major impetus behind enactment of the Fourteenth Amendment [10] was a desire to preserve the rights created by § 1 of the 1866 Act. As stated by one historian, "virtually every speaker in the debates on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act." H. GRAHAM, EVERYMAN'S CONSTITUTION 291

[7] Section 1982, "Property Rights," provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[8] Section 1 provided in pertinent part:

> That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[9] This Court has expressed doubt that the aims of the 1866 Act could constitutionally be achieved under the Thirteenth Amendment exclusively. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 476-477 (Harlan, J., dissenting), citing *Hodges* v. *United States*, 203 U.S. 1, 16-18 (1906); *Corrigan* v. *Buckley*, 271 U.S. 323, 330 (1926). But cf. *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

[10] The Amendment provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(1968).[11] One author has astutely noted that the Amendment "was designed to '*constitutionalize*' the Act, that is, to 'embody' it in the Constitution so as to remove doubt as to its constitutionality and to place it beyond the power of a later Congress to repeal." R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 23 (1977) (Emphasis in original). These observations thus confirm the validity of this Court's conclusion in *Hurd* v. *Hodge* that the 1866 Civil Rights Act and the Fourteenth Amendment were "expressions of the same general congressional policy." 334 U.S. at 32.

Shortly after its constitutionalization through the Fourteenth Amendment, the 1866 Act was re-enacted in the Voting Rights Act of 1870. *Buchanan* v. *Warley*, 245 U.S. at 78; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 422, n.28; *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. at 440, n.11. Two sections of the 1870 Act are relevant to our analysis. Section 18 simply re-enacted the 1866 Act in its entirety.[12] Section 16—the provision identified by the Court in *Runyon* as being one of the two primary sources of § 1981—is similar to, but not identical

[11] See also FLACK, *supra* at 81 ("[T]here seems to be little, if any, difference between the interpretation put upon the first section [of the Fourteenth Amendment] by the majority and the minority, for nearly all said that it was but an incorporation of the Civil Rights bill").

[12] Section 18 provided in pertinent part:

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted ....

with, § 1 of the 1866 Act.[13] While the rights at issue in this case (i.e., the right to contract and the right to full and equal benefit of all laws) are preserved in identical fashion in all three provisions, § 16, unlike § 1 of the 1866 Act and § 18 of the 1870 Act, guarantees those rights to "all persons," not merely "all citizens." [14] In spite of this slight modification, however, the scope of the 1866 Act was not altered by its 1870

[13] Section 16 provided:

> That all persons within the jurisdiction of the United States *shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

It should be noted that the language relevant to this case which has been italicized is identical to language appearing in § 1 of the 1866 Act, Revised Statutes § 1977 (See n. 15, *infra*), and § 1981.

[14] This Court has speculated that the first sentence of the Fourteenth Amendment—which grants United States citizenship to "all persons born or naturalized in the United States and subject to [its] jurisdiction"—may itself have been responsible for this change in language from the 1866 Act. *United States* v. *Wong Kim Ark*, 169 U.S. at 696; *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. at 440, n.11.

re-enactment, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 436, and as stated in § 18 of the 1870 Act itself, § 16 was to be "enforced according to the provisions" of the 1866 Act. *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. at 439, n.11.

The constitutional basis of the 1866 and 1870 enactments was implicitly reaffirmed by this Court following the 1874 codification of § 16 of the 1870 Act into § 1977 of the Revised Statutes.[15] *United States* v. *Wong Kim Ark*, 169 U.S. at 695; *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. at 439, n.11. In *Strauder* v. *West Virginia*, 100 U.S. 303, 312 (1879) the Court noted that § 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] amendment. It was a step towards enforcing the constitutional provisions." Similarly, in *Buchanan* v. *Warley*, 245 U.S. at 79, § 1977 was described as a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose." Revised Statutes § 1977 now appears as 42 U.S.C. § 1981.

As this developmental analysis reveals, § 1981 and the Fourteenth Amendment are correlative provisions

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[15] R.S. § 1977 provided that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other.

This is the precise language now codified as § 1981.

which share a common history and are expressive of the same congressional policies. The same may not be said, however, of § 1981 and Title VII. Those enactments, "although related, and although directed to most of the same ends," have nevertheless always been viewed as "separate, distinct and independent remedies for employment discrimination." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 461.[16] This Court also noted in *Johnson* that § 1981 and Title VII are neither procedurally nor substantively coextensive and that Congress has, in fact, created "independent administrative and judicial remedies." *Id.*

In addition to providing alternative remedies, § 1981 and Title VII are fundamentally different statutes enacted to accomplish different objectives. As noted, § 1981 is a manifestation of Congressional desire under the Thirteenth and Fourteenth Amendments "to provide for equal protection of the laws to all persons." *Runyon* v. *McCrary*, 427 U.S. at 204 (White J., dissenting), citing *Gibson* v. *Mississippi*, 162 U.S. 565, 580 (1896) and *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). It thus creates a judicial remedy for private litigants who claim that they have

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[16] Congressional intent in establishing separate remedies was clearly reflected in the debates on the 1972 amendments to the Civil Rights Act of 1964 when a proposed amendment which would have deprived claimants of any right to sue under § 1981 was rejected on the strength of Senator Williams' observation that Title VII and the Civil Rights Acts of 1866 and 1870 afford "alternative means" for redressing employment discrimination, and that adoption of the proposed amendment would "repeal the first major piece of civil rights legislation in the Nation's history." 118 Cong. Rec. 3371-3373 (1972), cited in *Runyon* v. *McCrary*, 427 U.S. at 174, n.11.

been denied equal protection of the laws on account of race. In contrast, Title VII is predicated upon the power of Congress to regulate commerce,[17] and is designed to eliminate discrimination in employment by prohibiting "*all practices in whatever form* which create inequality in employment opportunities due to discrimination on the basis of race, religion, sex or national origin." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 763 (1976) (Emphasis added); cf. *Griggs* v. *Duke Power Co.*, 401 U.S. at 429-430; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Section 1981 is thus broader than Title VII in one sense and narrower in another. Because its reach extends far beyond the area of discrimination in employment, it is a more inclusive statute than Title VII. However, to the extent that both provisions apply to employment discrimination Title VII is considerably broader—§ 1981 merely prohibits racial discrimination in employment contracting whereas Title VII encompasses "all practices in whatever form which create inequality in employment opportunity." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. at 763. Accordingly, "[C]ongress clearly has re-

[17] U.S. Const. Art. I, § 8, cl. 31. See 111 Cong. Rec. 7202-7212, 8453-8456 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 245-246 (1964). The extension of Title VII to governmental agencies in 1972, however, represented an exercise of congressional authority under § 5 of the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453, n.9 (1976).

tained § 1981 as a remedy against private discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII." *Johnson* v. *Railway Express Agency*, 421 U.S. at 466.[18]

In the past this Court has noted the extreme importance of distinctions such as these in evaluating claims that statutory standards are transferrable from one statutory scheme to another. For example, in *Washington* v. *Davis*, Mr. Justice Stevens, after noting that the parties had argued the case as though

[18] Respondents are not aided by several cases holding that, in many situations, the substantive requirements of § 1981 and Title VII should be interpreted consistently to avoid imposing conflicting requirements upon employers. See *e.g.*, *Chance* v. *Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007, *cert. denied*, 431 U.S. 965 (1977); and *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977); and *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). In those cases, the question of whether a showing of purposeful discrimination is required to establish *any* § 1981 violation was not addressed. Rather, the courts correctly concluded that employment practices which are not violative of Title VII should be immune from attack under § 1981. Those cases recognize that although both Title VII and § 1981 somewhat overlap regarding employment discrimination, Title VII focused on specific contemporary employment practices and provides "modern legislative history which is directly in point," as to which of these practices Congress intended either to permit or prohibit. See *Hinton* v. *Lee Way Motor Freight, Inc.*, 412 F. Supp. 625, 628-629 (W.D. Okla. 1975).

Title VII standards were automatically applicable to § 1981 and § 1-320 of the District of Columbia Code, cautioned that "there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history." 426 U.S. at 255. Similarly, in the course of analyzing whether § 1982 [19] prohibited racial discrimination in the private sale of real estate, the Court in *Jones* v. *Alfred H. Mayer Co.*, evaluated the possible impact on its decision of the recently-enacted fair housing title [Title VIII] of the Civil Rights Act of 1968. 42 U.S.C. § 3601 *et seq.* After noting that § 1982 would "stand independently" from Title VIII, the Court observed that there are:

> [v]ast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative, and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.

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[19] The text of § 1982 appears in n.7, *supra*. Sections 1981 and 1982 both originally appeared in § 1 of the 1866 Act and this Court has held that, "In light of the historical interrelationship between Sec. 1981 and Sec. 1982, there is no reason to construe these sections differently when applied [to private forms of discrimination]." *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. at 440, n.11.

392 U.S. at 417. This analysis was specifically relied upon by the Court in *Johnson* v. *Railway Express Agency*, as authority supportive of "the independence of the avenues of relief respectively available under Title VII and the older § 1981." 421 U.S. at 460.

This historical comparison of the relationship between § 1981 and the Fourteenth Amendment on the one hand, and § 1981 and Title VII on the other, underscores the validity of the conclusion drawn by dissenting Judge Wallace below that:

> [s]ection 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII . . . [and] that the standards for establishing a prima facie case of discrimination under section 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: there must be proof of discriminatory intent.

566 F.2d at 1349. Judge Wallace's analysis is fully supported by prior decisions of this Court. In *Hurd* v. *Hodge*, *supra*, the Court was asked to decide whether judicial enforcement of racially discriminatory real estate restrictive covenants by the courts of the District of Columbia violated Revised Statutes § 1978—the predecessor of § 1982.[20] After noting both the "close relationship between § 1 of the Civil Rights Act and the Fourteenth Amendment" and the holding in *Shelly* v. *Kramer*, 334 U.S. 1 (1948) that the *Fourteenth Amendment* forbids such discrimination where imposed by state courts in the enforcement of restrictive covenants, the Court concluded

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[20] See n. 7 and 19, *supra*.

that the *Shelly* v. *Kramer* Fourteenth Amendment holding "*is clearly indicative of the construction to be given the relevant provisions of the Civil Rights Act.*" 334 U.S. at 33 (Emphasis added). In precisely the same fashion, given the "close relationship" between § 1 of the Civil Rights Act and the Fourteenth Amendment, this Court's holding in *Washington* v. *Davis*, that purposeful discrimination must be shown to establish an unlawful employment practice under the Fourteenth Amendment "is clearly indicative of the construction to be given the relevant provisions [i.e., § 1981] of the Civil Rights Act." *Id.* Such a determination would be consistent with traditional rules of statutory construction which require that every statute involving constitutional rights is to be read in light of the Constitution, and that "[t]he Constitution and the statute will be construed together as one law." *Cincinnati, N.O. & T.P. R. Co.* v. *Kentucky*, 115 U.S. 321, 334 (1885); 16 Am Jur 2d, Const. Law § 144 (1964).

Only by applying the Fourteenth Amendment intent standard to § 1981 can the trend toward its interpretation as a "catch-all" discrimination provision be stemmed, and its original constitutional and legislative roots reaffirmed.

B. The Conclusion in *Washington* v. *Davis* That Disproportionate Impact Alone Does Not Constitute A Denial Of Equal Protection Is Dispositive Of The § 1981 Allegations In This Case.

The Fourteenth Amendment and § 1981 are conceptually as well as historically linked. Both are fundamentally equal protection enactments. The Fourteenth Amendment provides that "No state shall

. . . deny to any person . . . equal protection of the laws." Section 1981 provides that "All persons . . . shall have *the same* right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws for the security of persons and property as is enjoyed by white citizens." [21] (Emphasis added).

Section 1 of the 1866 Act and its progeny have always been viewed as the guarantors of equal protection of the laws, or as stated by this Court in *United States* v. *Wong Kim Ark*, 169 U.S. at 695, "the protection of equal laws." In explaining the purpose of the bill which was eventually to become Section 1 of the 1866 Act, its author and principal Senate supporter, Senator Trumbull, stated that "any statute which is not *equal to all*, and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Emphasis added). The equal protection foundation of § 1 was underscored by Senator Trumbull when he asserted that "it will have no operation in any State where the *laws are equal*, where all persons have the same civil rights without regard to race or color." *Id.* at 476 (Emphasis added). Similarly in the House, Representative Shellabarger, a bill proponent, contended that it secured "*equality of protection* in those enumerated civil rights which the States may deem proper to confer

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[21] As noted in n. 13, *supra*, identical language appeared in § 1 of the 1866 Act, §§ 16 and 18 of the 1870 Act, and § 1977 of the Revised Statutes.

upon any races." *Id.* at 1293-1294 (Emphasis added).[22]

The equal protection focus of § 1981 was sharpened through the constitutionalization of the 1866 Act into the Fourteenth Amendment and its subsequent reenactment in 1870 and codification in 1874 into Revised Statutes § 1977. Thus, § 1981 is now recognized as having been enacted—at least in part[23]—pursuant to "Congress' power under the Fourteenth Amendment to provide for equal protection of the laws to all persons." *Runyon* v. *McCrary*, 427 U.S. at 204 (White, J., dissenting), citing *Gibson* v. *Mississippi*, 162 U.S. 565, 580 (1896) and *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Croker* v. *Boeing Co.*, *supra* note 4, at 1181. Indeed, the official title to § 1981 —which may properly be considered as an aid to construction—is "Equal rights under the law." See *Runyon* v. *McCrary*, 427 U.S. at 193, n.3 (White, J., dissenting).

In *Washington* v. *Davis* this Court explicitly disagreed with the notion that an equal protection violation could be predicated upon evidence of disproportionate impact alone. In language which is dispositive of this case, the Court stated:

> We have difficulty understanding how a law establishing a racially neutral qualification for em-

[22] Accord, *Basista* v. *Weir*, 340 F.2d 74, 86 (3rd Cir. 1965) (The Civil Rights Acts "were intended to confer equality in civil rights before the law in all respects for persons embraced within their provisions.")

[23] See n. 6, *supra*.

> ployment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained . . . Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

426 U.S. at 245-246.[24] This conclusion was subsequently echoed in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) when the Court advised that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

The *Washington* v. *Davis* and *Arlington Heights* analysis is equally applicable to § 1981 cases such

[24] Mr. Justice Brennan's dissent in *Washington* v. *Davis* did not address the issue under consideration in the quoted portion of the majority opinion. 426 U.S. at 257, n. 1.

as this.[25] Minority applicants who are ineligible to execute employment contracts with petitioners by virtue of their failure to pass a racially neutral aptitude examination suffer no greater a disadvantage than unsuccessful white applicants. Identical examinations have been administered to all races and identical grading and scoring standards applied. In statutory terms, minorities have been afforded, "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Simply because the examination had a disproportionate effect on minorities does not—as this Court stated in *Washington* v. *Davis*—"demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test." 426 U.S. at 246. In the absence of evidence that the disproportionate impact is a product of discriminatorily motivated conduct, it cannot be said that minorities are being deprived on racial grounds of an equal capacity to contract as firemen.[26]

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[25] In *Lewis* v. *Bethlehem Steel Corp., supra* note 4, at 963, the quoted portion of *Washington* v. *Davis* was relied upon as a basis for imposing an intent requirement upon §§ 1981 and 1982. See also *Johnson* v. *Alexander, supra* note 4, at 1123.

[26] This analysis is consistent with the Ninth Circuit's own interpretation of § 1981 as expressed in *Agnew* v. *City of Compton*, 239 F.2d 226, 230 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957). After noting that the purpose of §§ 1981 and 1982 "is to provide equality of rights as between different races," the complaint therein was dismissed because it did "not allege that appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race."

The application of an intent requirement would also serve to harmonize § 1981 with its legislative purpose. Unlike Title VII which was enacted for purposes of prohibiting "all practices in whatever form which create inequality in employment opportunities" [27]—including, arguably, facially neutral examinations having a disproportionate impact on minorities—the predecessors of § 1981 were enacted in an effort to curtail overt, intentional discrimination against Negroes.[28] The post-Civil War climate which generated these enactments was described by this Court in *Strauder* v. *West Virginia*, 100 U.S. at 306 as follows:

> At the time when the [Thirteenth through Fifteenth Amendments] were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealously and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discrimination against them had been habitual. It was well known that in some States laws making such discrimination then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence [sic]. Their training had left them mere children, and as such they needed the pro-

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[27] *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. at 763.

[28] *Lewis* v. *Bethlehem Steel Corp., supra* note 4, at 963.

> tection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.

This was a period of rampant, overt racial discrimination; the concept of consequential discrimination resulting from the disproportionate impact of otherwise racially neutral conduct was still a century into the future. Congress in 1866 sought to address the fear of many that Negroes as a class might be "oppressed and in fact deprived of their freedom" not only by hostile laws but also by "prevaling public sentiment." Cong. Globe, 39th Cong., 1st Sess. 77 (1866), quoted in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 431-432, n. 54. It was in light of this historical background that the Court stated in *Jones* with specific reference to § 1 of the 1866 Act and § 1982—but with equal applicability to § 1981 [29]—that they were intended to prohibit all "racially motivated" deprivations enumerated therein. 392 U.S. at 421 and 426.

Accordingly, by virtue of this Court's interpretation of equal protection requirements in *Washington* v. *Davis* and by virtue of its analysis in *Jones* of the evils sought to be eliminated by the predecessors of § 1981, it is evident that there are sound con-

[29] See n. 19, *supra*.

ceptual as well as historical reasons for maintaining an intent requirement for § 1981.

C. Application Of The Disproportionate Impact Standard To § 1981 Would Undermine Substantially Both *Washington* v. *Davis* And The Title VII Enforcement Scheme.

There are also sound practical reasons for applying an intent requirement to § 1981. In *Washington* v. *Davis*, the Court explained the adverse practical consequences which would flow from applying a disproportionate impact standard to Fourteenth Amendment claims:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. [Citation omitted].

426 U.S. at 248. The Court concluded that extension of the disproportionate impact standard beyond those areas where it is already available by virtue of Title VII "should await legislative prescription." *Id.* Affirmance of the Ninth Circuit in this case would violate this principle and would effectively guarantee the very result which the Court expressly sought to avoid.

Section 1981 guarantees to all races not only the "same right . . . to make and enforce contracts", but also the "same right . . . to the *full and equal benefit of all laws and proceedings* for the security of persons and property" as is enjoyed by whites. (Emphasis

added). The scope of § 1981's prohibitions is thus virtually coextensive with that of the equal protection clause of the Fourteenth Amendment, and both extend far beyond the area of public employment. Accordingly, if a lesser standard of liability is applied to § 1981 than to the Fourteenth Amendment, the holding in *Washington* v. *Davis* can be circumvented entirely though the expediency of alleging a § 1981 rather than a Fourteenth Amendment claim. *Croker* v. *Boeing Co.*, *supra* note 4, at 1181.

In addition to effectively negating the practical effect of the Court's decision in *Washington* v. *Davis*, application of Title VII standards of liability to § 1981 allegations would also undermine the enforcement scheme of Title VII itself. All of the remedies, both legal and equitable, which are available under Title VII may be available under § 1981. Indeed, in some respects the § 1981 remedies are more generous. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 460. Unlike § 1981, however, Title VII requires the exhaustion of certain administrative procedures as a condition to suit. If, however, the standards of proof for both provisions are identical and the remedies available under § 1981 more liberal, there is absolutely no incentive for aggrieved plaintiffs to opt for the more onerous administrative route.

This result of the Ninth Circuit's decision is more than of mere academic or passing interest. As a practical matter it will totally frustrate the scheme devised by Congress for the elimination of employment discrimination. The centerpiece of this scheme is the prompt resolution of discrimination charges through conciliation. Under Title VII a charge must

be filed within the relatively brief period of 180 days. Section 706(e), 42 U.S.C. § 2000e-5(e). A charge having been filed, the Equal Employment Opportunity Commission (EEOC) is required to exhaust all conciliation efforts prior to instituting suit. *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359-360 (1977). In *EEOC* v. *Sherwood Medical Industries*, —— F.Supp. ——, 17 FEP Cases 441, 444 (M.D. Fla. 1978) the court noted "the mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations." Similarly, the Fourth Circuit observed in *Patterson* v. *American Tobacco Co.*, *supra* n. 18, at 272 that the EEOC's "statutory duty to attempt conciliation is among its most essential functions." Clearly, the effect of equating the standards of proof required under Title VII and § 1981 will be to flood the federal courts with employment discrimination cases which might otherwise have been settled voluntarily and amicably by the disputants themselves through EEOC-supervised conciliation efforts.

Accordingly, unless the Ninth Circuit is reversed and the constitutional intent standard applied to § 1981, both the Court's desire to insulate nonemployment regulatory statutes from disproportionate impact challenges, and Congress' desire for a prompt and voluntary resolution of employment discrimination claims, will be seriously frustrated.

II. The Ninth Circuit's Quota Remedy Is Inappropriate.

A. The Courts' Remedial Authority Is Not Unlimited, But Is Restricted To Remedying Specific Violations Found.

The remedial quota established by the Ninth Circuit offends this Court's long established principle that "as with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); and *The Regents of the University of California* v. *Allan Bakke*, —— U.S. ——, 46 U.S.L.W. 4896, 4904 (1978) (opinion of Mr. Justice Powell), and cases cited therein.

These same restrictions apply to employment discrimination claims where the remedial choices " 'are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975), citing *United States* v. *Burr*, 25 Fed. Cas. 30, 35. It is evident, therefore, that "courts may not impose . . . a remedy on an employer at least until a violation . . . has been proven." See *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 46 U.S.L.W. 4966, 4969 (1978).

In further explaining these remedial limits, this Court has stressed that, as under the National Labor Relations Act,[30] remedies under the civil rights acts

[30] See *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7, 9-11 (1940); and *Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651, 655 (1961) (Where "no 'consequences of violation' are removed . . .; and no 'dissipation' of the prohibited action is

are designed to recreate the conditions and relationships that would have existed had there been no violation, and to make the employees whole as they would have been but for the employer's wrongful act. See *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. at 769. Therefore, a court should frame its relief with an eye toward remedying the particular wrong found, "and should interfere with the defendant's operations no more than is necessary to accomplish this result." See *EEOC* v. *IUOE, Locals 14 & 15*, 553 F.2d 251, 256 (2nd Cir. 1977).[31] As now demonstrated, the remedial hiring order imposed by the court below is inconsistent with these requirements.

Thus, even assuming that the violations found by the Ninth Circuit may be maintained under § 1981,[32] the hiring quota was outside its remedial authority. Indeed, the remedy appears to be unprecedented both for its disregard of the remedial standards established

achieved . . . [t]he order . . . becomes punitive and beyond the power of the Board.") See generally McDowell and Huhn, *NLRB Remedies for Unfair Labor Practices*, Industrial Research Unit, The Wharton School, University of Pennsylvania (1976) 6-15.

[31] See also *Furnco Construction Corp.* v. *Waters*, 46 U.S. L.W. at 4969 ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); and *Milliken* v. *Bradley*, 418 U.S. at 744 (Control of school district "is a task which few, if any, judges are qualified to perform.")

[32] As shown above, however, the absence of discriminatory intent requires a dismissal of the § 1981 claims. If the Court accepts that contention, it need not reach the quota issue in this case.

by this and other courts, and for its failure to limit the remedy to the nature and extent of the violations.

Although the scope of the violations found by the district court was markedly broader than those sustained by the Ninth Circuit, the appellate court approved essentially the same remedy, thereby evidencing an insensitivity to the limits of its equitable authority. The district court's quota order was based on two primary factors: (a) an imbalance between the percentage of Blacks and Mexican-Americans in the County's workforce and the surrounding population at the time the complaint was filed; and (b) the County's 1969 and 1972 use of employment tests which had a disproportionate impact on minorities.

The Ninth Circuit substantially deviated from the findings of the court below and significantly narrowed the factors upon which its quota could be based. It found that there was no one among the named plaintiffs or the putative class who had standing to challenge the 1969 test because the hiring list compiled from that test was depleted before plaintiffs applied for employment. 556 F.2d at 1337-1338. This holding effectively precluded the named plaintiffs and putative class members (i.e., all present and future Black and Mexican-American applicants) from attacking any employment practices predating their applications.[33]

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[33] Because of this complete lack of standing, the majority found it unnecessary to rule on the applicability of *East Texas Motor Freight Systems, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977). 556 F.2d at 1338, n. 6. There the Court held that a plaintiff who has been adjudicated not to have suffered the injury allegedly sustained by an uncertified class is not a class member and may not be a class representative. From *Rodriguez,* it follows *a fortiori* that the validity of petitioners' pre-1971 employment practices could not be attacked here because no class member had standing to pursue the claim.

The only testing violation found by the Ninth Circuit was in the County's unfulfilled decision to use the 1972 written test as a selection device. As Judge Wallace noted, both he and the majority agreed that "defendants are liable for nothing more than devising a plan—never carried out—which would have had a discriminatory impact." 556 F.2d at 1352. He also stressed that the plaintiffs' brief had conceded that "the post-March 1972 discrimination . . . had no 'effects.'" *Id.* The majority nevertheless ratified the quota imposed by the district court, apparently relying upon the underutilization of minorities in the workforce as compared with their availability. 556 F.2d at 1334. But as Judge Wallace indicated, these statistics "are necessarily the result of the County's pre-1971 hiring practices, since no firemen were hired thereafter until the complaint was filed." 556 F.2d at 1345.

The error committed by the Ninth Circuit here is grounded on the same fallacy which prompted this Court to reverse the Seventh Circuit in *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977). There, the Court cautioned that the difference between a remedy issue and a violation issue must be kept clear. 431 U.S. at 559. It is only after a timely discrimination claim has been filed and a finding of discrimination upon that claim has been made that the courts have the authority to contemplate whether a remedy may be imposed. Under this teaching in *Evans,* the

crucial question is not whether there may be some continuity between existing conditions and some past conduct. The question, rather, is whether any present *violation* exists. 431 U.S. at 558. It is not sufficient—as the courts below have sought to do—to support a discrimination claim by merely showing that some effects of past conduct persist. This is true even if the past event might have at some time supported a valid claim against the employer. Unless such a claim is made at the proper time, it may, at most, be used as relevant background evidence in a proceeding concerning a current practice.

As cogently stated in Judge Wallace's dissent, "the racial imbalance of which the plaintiffs complain was neither aggravated nor perpetuated by the defendants' actionable discrimination." 556 F.2d at 1352. Because there is no authority for a court "imposing on an employer a duty to implement an affirmative action program or other corrective measures absent a court finding" of a violation, the remedy at issue is improper. *EEOC* v. *Delta Air Lines, Inc.*, —— F.Supp. ——, 14 EPD (CCH) par. 7783, p. 5633 (N.D. Ga. 1977). See also *Lewis* v. *Tobacco Workers*, —— F.2d ——, 17 FEP Cases 622, 627 (4th Cir. 1978).

Because no allegations of widespread pre-1971 violations were properly before the Ninth Circuit, its remedial order here is not supported by the prospective hiring provisions contained in the consent decree referred to in *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 330, n.4 (1977). (See Respondents op. cert. at 27). There, the Court repeatedly stressed the fact that a widespread "pattern and

practice" of discrimination had been shown, and further pointed out that a "single, insignificant, isolated act of discrimination by a single business' " would not establish a pattern or practice. 431 U.S. at 336-337, n. 16.

In addition, the remedial discussion *set forth* in *Teamsters* does nothing to support the Ninth Circuit's quota. For, rather than permitting a blanket preference for minorities, the Court established a system under which applicant and nonapplicant claimants would be required to identify themselves to the district court in a remedy proceeding as victims of the discriminatory hiring and transfer practices. The requirements for nonapplicants are particularly instructive, as the Court stated that the possibility of obtaining relief "is a far cry, however, from holding that nonapplicants are always entitled to relief." 431 U.S. at 367. Instead, the claimant must carry the difficult burden of establishing he was deterred by the illegal practices from applying for the job. 431 U.S. at 367-368.

Likewise, the retroactive seniority relief sanctioned in *Franks* v. *Bowman Transportation Co., Inc.*, was limited to identifiable victims of an established pattern or practice of discrimination. 424 U.S. at 772, 774. As pointed out in *Teamsters* v. *United States*, this pattern or practice established in *Franks* was a prerequisite for the creation of a rebuttable presumption in favor of individual relief. See 431 U.S. at 358-359 and n. 45.

It is evident, therefore, that the preferential hiring order in this case far exceeds any remedy previously sanctioned by this Court.

B. Workforce Racial Imbalance Alone Will Not Support The Quota Remedy.

By imposing the preferential hiring remedy, the Ninth Circuit attempted to *compel* the County to adopt hiring procedures to assure that its workforce's racial composition would closely mirror the surrounding general population.[34] But, where, as here, the violation found has not contributed to that imbalance, such a remedy is much more stringent than permitted by the civil rights laws.

This Court has emphasized repeatedly that the obligation imposed on employers by the relevant nondiscrimination statutes is to provide "an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." See *Furnco Construction Corp.* v. *Waters*, 46 U.S.L.W. at 4970. As stated in *Griggs* v. *Duke Power Co.*, 401 U.S. at 430:

> Congress did not intend Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Accord, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 800-801; and *Int'l. Brotherhood of Teamsters* v. *United States*, 431 U.S. at 340, n.20 ("Title VII imposes no requirement that a workforce mirror the general population.").[35] Similarly, the courts repeatedly have held that Section 1981 "is by its very terms . . . not an affirmative action program." *Long* v. *Ford*

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[34] It should be noted that this case does not call into question the validity of affirmative action plans which have been undertaken *voluntarily* to achieve racial balance. Compare *Weber* v. *Kaiser Aluminum and Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977), *pet. for reh'g denied*, 571 F.2d 337; and *Detroit Police Officers Assn.* v. *Young*, 446 F.Supp. 979 (E.D. Mich. 1978), *appeal pending* No. 78-1163 (6th Cir.). Cf. *The Regents of the University of California* v. *Allan Bakke, supra.* Rather, at issue is the authority of the court to *impose* such relief absent sufficient supportive findings of discrimination.

[35] Although statistical disparities in some circumstances might establish a *prima facie* case of discrimination, it is important not to equate a *prima facie* showing with an ultimate finding of a discriminatory refusal to hire. See *Furnco Construction Corp.* v. *Waters*, 46 U.S.L.W. at 4969-4970. Even less appropriate is the Ninth Circuit's attempt to fashion a remedy based upon background underrepresentation statistics not directly related to the charges considered by the court. Such an approach effectively deprives the employer of his opportunity to present rebuttal evidence to counteract the plaintiff's undifferentiated statistical evidence. See generally *Int'l. Brotherhood of Teamsters* v. *United States*, 431 U.S. at 339-340 and n. 20; and *Hazelwood School District, et al.* v. *United States*, 433 U.S. 299, 307-313 (1977).

Motor Co., 496 F.2d 500, 505 (6th Cir. 1974). Rather:

> It is an equalizing provision seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. *Id.*[36]

As shown above, the evident purpose of the hiring remedy was to impose a hiring scheme to racially balance the employer's workforce, even though there was no related finding of discrimination and not even a putative class member who would have been eligible to attack the practices which might have contributed to the imbalance. Previously, this Court has cautioned the appellate courts that such an approach is impermissible. As stated in *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977):

> Viewing the findings of the District Court as to the three-part "cumulative violation" in the strongest light for the respondents, *the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did.* There had been no showing that such a remedy was necessary to "eliminate all vestiges of the state-imposed school segregation." It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without

[36] Accord, *Blount* v. *Xerox Corp.*, 405 F. Supp. 849, 853, (N.D. Cal. 1975); *Broussard* v. *IUOE Apprenticeship Committee*, —— F. Supp. ——, 10 FEP Cases 780, 784 (D. Md. 1974); and *Dickerson* v. *United States Steel Corp.*, *supra* n. 4, at slip op. p. 20.

> more, of course, does not offend the Constitution. *Spencer* v. *Kugler*, 404 U.S. 1027 (1972); *Swann*, [402 U.S. at 24]. The Court of Appeals seems to have viewed the present structure of the Dayton school system as a sort of "fruit of the poisonous tree," since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregation action found by the District Court. *But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.* (Emphasis added).

Under these principles, the hiring remedy should be set aside because it fails to limit the remedy to correlative acts of discrimination and is directly contrary to the basic principles underlying the civil rights acts.

C. The Court's Remedial Order Lacks Judicial Support.

As demonstrated above, the preferential hiring remedy was imposed by the Ninth Circuit without any evident concern about whether such a remedy was justified by the discrimination found. In fact, in its discussion of the quota remedy, the Ninth Circuit majority barely mentions the violations at all, but rather relies mainly upon a boilerplate string citation of the cases which have approved preferential hiring relief. None of those decisions was discussed in any detail, and a brief examination reveals that the Ninth Circuit's facile approach contrasts greatly with virtually every other decision approving quotas.

Thus, many other appellate decisions have recognized the sensitive problems raised by the remedy and have expressed reluctance in granting quota relief,

even where widespread systemic discrimination has been proven. As was stated in *Crockett* v. *Green*, 388 F. Supp. 912, 921 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976):

> [R]atio hiring or quota relief is an unusual and extraordinary remedy and does not automatically follow from the finding of any kind of discrimination . . . [It] is appropriate . . . [where] . . . it appears to be the *only* possible means to provide relief for racial discrimination. (Emphasis added).[37]

In addition, the principal cases approving quota relief have done so only after particularly egregious

[37] Accord, *Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh. denied*, 430 U.S. 911 (1977) ("Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm."); *Patterson* v. *American Tobacco Co.*, *supra*, note 18, at 274 ("[T]he necessity for preferential treatment should be carefully scrutinized and . . . such relief should be required only when there is compelling need for it."); *United States* v. *City of Chicago*, *supra* note 4, at 437 ("Preferential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of each case."); *White* v. *Carolina Paperboard Corp.*, —— F.2d ——, 16 FEP Cases 44, 58 (4th Cir. 1977) ("But we have declined to approve the imposition of quotas where, as here, adequate relief can be obtained without their use."); and *Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973). See also *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2nd Cir. 1975), *reh'g en banc denied*, 531 F.2d 5, *cert. denied*, 429 U.S. 823 (1976) ("The most ardent supporters of quotas . . . have recognized their undemocratic inequities and conceded their use should be limited."); and *EEOC* v. *Local 638*, 532 F.2d 821 (2nd Cir. 1976).

discriminatory practices had been properly established by timely claims and specifically set forth as the basis for the relief imposed. For example, in *United States* v. *Lathers, Local 46*, 471 F.2d 408 (2d Cir. 1973), a quota was ordered only after the union was cited for contempt in failing to comply with a court-approved settlement agreement. And even where such practices have been established, the decisions indicate that the preferential relief may go no further than to eliminate the identifiable lingering effects of previous discriminatory practices by the particular employer.[38]

In sum, most appellate courts, while not entirely consistent in their approaches to quotas and other preferential remedies in cases of employment discrimination, have been more careful in assessing liability, and much more reluctant to impose quota remedies than the Ninth Circuit in this case. It follows, therefore, that "in view of the limited scope of the issues framed in this class action and the paucity of

[38] *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Western Addition Community Organization* v. *Alioto*, 514 F.2d 542 (9th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 895 (1974) (Temporary quota imposed because of lack of compliance with district court's initial decree); and *NAACP* v. *Allen*, 493 F.2d 614, 621 (5th Cir. 1974) (The quota "is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee that they would fail.").

the proof concerning past discrimination," [39] the quota hiring remedy established below should be set aside.[40]

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Ninth Circuit should be reversed with instructions that the order of the district court be vacated and the complaint dismissed.

Respectfully submitted,

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[39] *Kirkland* v. *Department of Correctional Services*, 520 F.2d at 428.

[40] For a fuller discussion of court decisions relating to preferential treatment remedies under Title VII and other civil rights acts see McGuiness, *Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination?*, EEAC (1977) 73-106.